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No. 07-582

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

FOX TELEVISION STATIONS, INC., ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the
Second Circuit

Brief Amici Curiae of the American Center for Law & Justice and United States Representatives Charles Pickering, Roscoe Bartlett, Kevin Brady, Paul Broun, Danny Davis, John Doolittle, Mary Fallin, Trent Franks, Wally Herger, Jim Jordan, Doug Lamborn, Kenny Marchant, Jeff Miller, Marilyn Musgrave, Joe Pitts, Mark Souder, Tim Walberg and Dave Weldon In Support of Petitioner

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QUESTION PRESENTED

Whether the court of appeals erred in striking down the Federal Communications Commission's determination that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of any "obscene, indecent, or profane language," 18 U.S.C. 1464; see 47 C.F.R. 73.3999, when the expletives are not repeated.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE FCC'S INDECENCY POLICY SERVES THE GOVERNMENT'S COMPELLING INTEREST IN PROTECTING CHILDREN FROM EXPOSURE TO INDECENT MATERIAL DURING TIMES THAT CHILDREN ARE LIKELY TO BE PART OF THE BROADCAST AUDIENCE 4

II. THIS COURT SHOULD UPHOLD THE FCC'S BROADCAST INDECENCY POLICY CHANGE BECAUSE THE FCC HAS ARTICULATED A SUFFICIENTLY REASONED BASIS FOR THE CHANGE . . . 7

A. The lower court erred by failing to analyze the FCC's stated reasons for its policy change 8

B. The FCC's stated rationale for its policy change was not arbitrary or capricious 12

III. THE FCC'S CONTEXT-BASED APPROACH ALLOWS IT TO PROTECT THE RIGHTS OF ADULTS AND SIMULTANEOUSLY FURTHER ITS COMPELLING INTEREST IN PROTECTING CHILDREN 17

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Bowman Transportation, Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281 (1974) 17

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 20

Butler v. Michigan, 352 U.S. 380 (1957) 6, 18

Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996) 4-5, 18

FCC v. Pacifica Foundation, 438 U.S. 726 (1978) . . . . . passim

Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007) 8, 17

Ginsberg v. New York, 390 U.S. 629 (1968) 5

Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983) 7, 8, 12, 17

SEC v. Chenery Corp., 332 U.S. 194 (1947) 8

STATUTES

Administrative Procedures Act, 5 U.S.C. § 706 . . . . . 12, 17

5 U.S.C. § 706(2)(A) 12

FCC ORDERS & OPINIONS

FCC, *Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999 (2001) . . . . . 14 -16

In Re Citizen's Complaint Against Pacifica Found. Station WBAI (FM), New York, New York, 56 F.C.C.2d 94 (1975) 6, 13

In Re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975 (2004) 9-10, 13, 16

In Re Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan," 20 F.C.C.R. 4507 (2005) . . . 18, 19

In Re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 13299 (2006) . passim

In Re Infinity Broadcast Corp. of Pennsylvania (WYSP(FM)), 3 F.C.C.R. 930 (1987) 15

In Re WUHY-FM, Eastern Educ. Radio, 24 F.C.C.2d 408 (1970) 15

Pacifica Found., Inc., Memorandum Opinion and Order, 2 F.C.C.R. 2698 (1987) 13, 15

INTEREST OF AMICI[1]

Amicus, the American Center for Law and Justice (ACLJ), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States and other federal and state courts in numerous cases involving constitutional issues, with a particular emphasis on the First Amendment.[2] Although this case calls for avoidance of any constitutional analysis, its proper resolution is of significant interest to the ACLJ as it involves issues closely related to First Amendment concerns.

The ACLJ maintains a strong interest in helping to ensure the protection of our nation's youth from harmful material, including pornography, obscenity, and indecency. Because Congress has specifically tasked the Federal Communications Commission (FCC or Commission) with regulating broadcast media, and the Commission has provided adequate justification for its current indecency regulation policy–which affords minors greater protection from the harm occasioned by exposure to indecent material without infringing the

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[1] The parties in this case have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part. No person aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

[2] *See, e.g., McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987).

constitutional rights of adults–it is essential that this policy be respected by broadcasters and upheld by this Court.

Amici, United States Representatives Charles Pickering, Roscoe Bartlett, Kevin Brady, Paul Broun, Danny Davis, John Doolittle, Mary Fallin, Trent Franks, Wally Herger, Jim Jordan, Doug Lamborn, Kenny Marchant, Jeff Miller, Marilyn Musgrave, Joe Pitts, Mark Souder, Tim Walber and Dave Weldon currently serve in the 110th Congress. These amici strongly support the FCC's discretionary authority to adopt new broadcast indecency regulations that provide greater protection to children without infringing the constitutional rights of adults. In particular, these amici support the new indecency policy at issue, as clearly articulated by the FCC.

SUMMARY OF ARGUMENT

While this Court has held that the Constitution protects the right of adults to access indecent material, the government has a vital interest in protecting minors from the harmful effects occasioned by exposure to indecency. One of the primary means by which the government has traditionally afforded this protection is by regulating indecency in broadcast media, a form of communication widely accessible to children of all ages. Congress has vested the FCC specifically with the authority to enact policies for this purpose, and the Commission has long adhered to a system, approved by this Court, *see FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978), of heightened regulation during times when children are likely to comprise a significant portion of the broadcast

audience. This allows the FCC to help minimize exposing minors to indecency without infringing the right of adults, who may continue to access such material at times when children are less likely to be among the audience.

Within its broadcast regulation regime, the FCC has placed particular emphasis on the importance of context when determining whether specific material is indecent. For a time, the Commission refrained from finding expletives actionably indecent if they were not repeated. Ultimately, however, the FCC recognized that basing an indecency determination on a single factor–whether the material was repeated–undermines its well-established context-based approach to such decisions. Recognizing the reality that even the single use of an expletive, in some contexts, may have the harmful effect on children that the FCC's broadcast indecency regulation policies are intended to prevent, the Commission concluded that the single factor of repetition, or lack thereof, would no longer be dispositive of whether material is indecent.

Instead, the FCC explained that it would look to the overall context of all broadcast material, including non-repeated expletives, when making indecency determinations. Thus, contrary to the Second Circuit's conclusion, the FCC's new policy is based not on the harm occasioned by the "first blow" of exposure to indecency but on the Commission's wholly rational recognition of a need for consistent application of its context-based approach to indecency regulation, in which the harm of the "first blow," like the repetition of expletives, is merely a single factor for consideration. Because this policy is entirely reasonable and was clearly articulated and explained

by the FCC, it is sufficient to survive scrutiny under the arbitrary and capricious standard of the Administrative Procedures Act (APA).

Rather than forcing the FCC to ignore harm to children simply because offensive material is uttered in isolation, this policy allows the FCC to weigh all the relevant contextual factors before determining whether material is indecent. As previous FCC decisions demonstrate, consideration of the entire context of broadcast material may result in a determination that expletives are not actionably indecent even when repeated throughout a program. The FCC should be free to apply this context-based approach in a consistent manner, regardless of how many times offensive material is broadcast in a single program.

ARGUMENT

I. THE FCC'S INDECENCY POLICY SERVES THE GOVERNMENT'S COMPELLING INTEREST IN PROTECTING CHILDREN FROM EXPOSURE TO INDECENT MATERIAL DURING TIMES THAT CHILDREN ARE LIKELY TO BE PART OF THE BROADCAST AUDIENCE.

This Court repeatedly has affirmed that the government in general—and the FCC in particular—have a compelling interest in preventing or limiting the exposure of children to indecent and obscene material. *See, e.g., Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 743 (1996) (noting that the statute at issue was "accompanied with an extremely important

justification, one that this Court has often found compelling—the need to protect children from exposure to patently offensive sex-related material"). In *Ginsberg v. New York*, 390 U.S. 629 (1968), this Court explained: "We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors." *Id.* at 639. Distinguishing the state's interest in ensuring the protection of constitutional rights from its "independent interest in the well-being of its youth," *id.* at 640, this Court noted:

> The world of children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose different rules . . . [I]t suffices to say that regulations of communication addressed to them need not conform to the requirements of the First Amendment in the same way as those applicable to adults.

Id.

In *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978), this Court affirmed the FCC's authority to regulate minors' access to indecent broadcasting just as "[o]ther forms of offensive expression may be withheld from the young without restricting the expression at its source," *id.* at 749. The Court observed that

> broadcasting is uniquely accessible to children, even those too young to read. Although . . . [a] written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant.

Id. at 749. The *Pacifica* Court reaffirmed its holding in *Ginsberg* that "the government's interest in the 'well-

being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected expression." *Id.* (citation omitted). The Court concluded that "[t]he ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting." *Id.* at 750.

In accord with this Court's holdings, the FCC has long held that "the concept of 'indecent' is intimately connected with the exposure of children to [patently offensive] language." *In Re Citizen's Complaint Against Pacifica Found. Station WBAI (FM), New York, New York*, 56 F.C.C.2d 94, 98 ¶ 11 (1975) ("Pacifica Order"). For this reason, the FCC most heavily regulates broadcast media during the times when children are expected to be in the audience. This includes primetime programs—such as the Billboard Music Awards Show—that are "designed to draw a large nationwide audience . . . [and can] be expected to include many children." *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 13299, 13305 ¶ 18 (2006) ("Remand Order"). The FCC's policies reflect the view outlined in *Pacifica* that broadcast programming is "uniquely accessible to children," regardless of their ability to read. *Id.* at 13318 ¶ 47 (quoting *Pacifica*, 438 U.S. at 749).

Importantly, as explained in Section III, *infra*, the FCC's policy here does not "reduce the adult population . . . to . . . only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). The FCC's context-based approach continues to allow the broadcasting of ample programming geared toward

adults. The FCC's indecency policy represents a rational, sensible balance of the government's compelling interest in protecting children from indecent content and its interest in ensuring that adults are not limited solely to broadcast material suitable for young children.

II. THIS COURT SHOULD UPHOLD THE FCC'S BROADCAST INDECENCY POLICY CHANGE BECAUSE THE FCC HAS ARTICULATED A SUFFICIENTLY REASONED BASIS FOR THE CHANGE.

The Second Circuit's holding, that the FCC failed to articulate a reasoned explanation for its indecency regulation policy change sufficient to pass muster under the APA, is plainly wrong. The FCC's order clearly stated the bases for the agency's decision, each of which is rationally related to the Commission's compelling interest in protecting minors from indecent material. This Court has recognized "that '[regulatory] agencies do not establish rules of conduct to last forever,' *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983), and "[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances." *Id.* at 57 (citation omitted). Coupled with the fact that the FCC provided the requisite "reasoned analysis," *id.*, of its changed indecency policy, these recognitions require upholding that policy.

A. The lower court erred by failing to analyze the FCC's stated reasons for its policy change.

The Second Circuit's opinion demonstrates a patent misreading of the FCC order at issue, *see Remand Order*, in which the FCC clearly stated the rationale for its change in broadcast indecency regulation. The Second Circuit correctly recognized this Court's admonition that courts may not uphold an agency decision by "'supply[ing] a reasoned basis for the agency's action that the agency itself has not given,'" *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 455 (2d Cir. 2007) (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43); however, the court ran afoul of the corollary "fundamental rule of administrative law . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action *solely by the grounds invoked by the agency*." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (emphasis added). The Second Circuit erred in this respect by failing to analyze the FCC's changed indecency policy on the basis of "the grounds invoked by the agency." According to the Second Circuit, "[t]he primary reason for the crack-down on fleeting expletives advanced by the FCC is the so-called 'first blow' theory described in the Supreme Court's *Pacifica* decision." *Fox Television Stations, Inc.*, 489 F.3d at 457 (citing *Remand Order* at 13309 ¶ 25). While the FCC certainly discussed the "first blow" theory in the *Remand Order*, it did so only within the framework of its new *context-based* policy.

As the *Remand Order* explained, "decisions issued before [the] *Golden Globe* [order] had suggested that

expletives had to be repeated to be indecent but 'descriptions or depictions of sexual or excretory functions' did not need to be repeated to be indecent . . ." 21 F.C.C.R. at 13308 ¶ 23. In 2004, however, the FCC concluded that "any such interpretation is no longer good law." *In Re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, 4980 ¶ 12 (2004) ("Golden Globe Order"). In that order, the FCC provided the following explanation for its new approach to broadcast indecency regulation:

> The "F-Word" is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language. Its use invariably invokes a coarse sexual image. The use of the "F-Word" here, on a nationally telecast awards ceremony, was shocking and gratuitous. In this regard, NBC does not claim that there was any political, scientific or other independent value of use of the word here, or any other factors to mitigate its offensiveness. If the Commission were routinely not to take action against isolated and gratuitous uses of such language on broadcasts when children were expected to be in the audience, this would likely lead to more widespread use of the offensive language. Neither Congress nor the courts have ever indicated that broadcasters should be given free rein to air any vulgar language, including isolated and gratuitous instances of vulgar language.

Id. at 4979 ¶ 9. Based on this rationale, the FCC held that "the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding

that material that is otherwise patently offensive to the broadcast medium is not indecent." *Id.* at 4980 ¶ 12.

Elaborating on the above explanation from the *Golden Globe Order*, the *Remand Order* expressly articulated several reasons for the FCC's new approach to broadcast indecency regulation, including the following:

- "To begin with, any strict dichotomy between 'expletives' and 'descriptions or depictions of sexual or excretory functions' is artificial and does not make sense in light of the fact that an 'expletive's' power to offend derives from its sexual or excretory meaning.
- "Moreover, in certain cases, it is difficult (if not impossible) to distinguish whether a word is being used as an expletive or as a literal description of sexual or excretory functions."
- "Finally, and perhaps most importantly, categorically requiring repeated use of expletives in order to find material indecent is inconsistent with our general approach to indecency enforcement, which stresses the critical nature of context. In evaluating whether material is patently offensive, the Commission's approach has generally been to examine all factors relevant to that determination. To the extent that Commission dicta had previously suggested that one of these factors—whether material had been repeated— would always be decisive in a certain category of cases, . . . such dicta was at odds with the Commission's overall enforcement policy and was appropriately disavowed."

Remand Order, 21 F.C.C.R. at 13308 ¶ 23. Thus, the FCC's clearly articulated reasons for changing its approach to broadcast indecency regulation focused not solely, or even primarily, on the "first blow" theory but on the desire for consistency with its overall indecency enforcement policy through a context-based approach.

Only after providing the above rationale did the FCC "[t]urn[] back to" the specific broadcast at issue to discuss the impact of "'the first blow' to the television audience *in the circumstances presented here*." *Id.* at 13308 ¶ 24 (emphasis added). Such language supports the understanding that the FCC's primary purpose in changing its policy was not to prevent the "first blow" at all times, but rather to allow the Commission to assess indecency on the basis of the overall context of individual broadcasts, in which the harm of the "first blow" is merely one of the relevant factors. As the discussion within the *Remand Order* makes plain, the FCC analyzed language that was broadcast within a given context—the Billboard Music Awards Show—and simply concluded that, *in that context*, the harm of the "first blow" constituted one of the factors resulting in a finding of indecency. Nowhere did the FCC articulate the "first blow" as the sole or primary basis for its policy change such that all fleeting expletives are now actionably indecent. Instead, it explained that the impact of the "first blow" occasioned by the use of a single expletive *in some contexts* prevented the agency from "granting an *automatic exemption* for 'isolated or fleeting' expletives . . . ." *Id.* at 13309 ¶ 25 (emphasis added).

Thus, the Second Circuit failed to correctly identify the stated reasons for the FCC's change in broadcast indecency regulation and consequently failed to

properly analyze those reasons under the relevant standards of the APA.

B. The FCC's stated rationale for its policy change was not arbitrary or capricious.

Section 706 of the APA limits the scope of judicial review of agency decisions. *See* 5 U.S.C. § 706. Specifically, § 706(2)(A) provides that "a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute." As this Court previously has observed, under the APA's "arbitrary and capricious" standard, "the scope of review . . . is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. A reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.*

If, however, the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made,'" *id.* (citations omitted), the agency's decision must stand. The FCC's decision to regulate all broadcast indecency according to a context-based approach, in which repetition (or lack of repetition) of indecent material is not dispositive but is simply one factor for consideration, is entirely rational and therefore satisfies these standards. Indeed, this Court has acknowledged that "[i]t is a characteristic of speech such as this that both its capacity to offend and its 'social value,' . . . vary

with the circumstances." *Pacifica*, 438 U.S. at 747. The FCC's new broadcast indecency policy merely allows the Commission to base its determinations on all of the relevant circumstances.

The FCC's previous approach to indecency regulation provided that expletives had to be repeated to be actionably indecent, while a single description or depiction of sexual or excretory functions was sufficient to find indecency. *See Remand Order*, 21 F.C.C.R. at 13306-07 ¶ 20-21 (citing *Pacifica Found., Inc., Memorandum Opinion and Order*, 2 F.C.C.R. 2698, 2699 (1987) ("Pacifica Opinion & Order"); *Golden Globe Order*, 19 F.C.C.R. at 4980 ¶ 12; and subsequent Bureau-level decisions). As the FCC articulated in the *Remand Order*, however, "any strict dichotomy between 'expletives' and 'descriptions or depictions of sexual or excretory functions' is artificial and does not make sense in light of the fact that an 'expletive's' power to offend derives from its sexual or excretory meaning." 21 F.C.C.R. at 13308 ¶ 23.

As early as the 1970s, the Commission concluded that seven expletives, including the "F-word" and the "S-word," "depict sexual and excretory activities and organs . . . ." *Pacifica Order*, 56 F.C.C.2d at 99 ¶ 14. Based on this conclusion, and following this Court's *Pacifica* decision, the FCC adopted an "indecency definition, which since [that time] has involved the description of sexual or excretory organs or activities." *Remand Order*, 21 F.C.C.R. at 13308 ¶ 23. In the *Golden Globe Order*, the FCC again explained that "given the core meaning of the 'F-Word,' any use of that word or a variation, in any context, inherently has a sexual connotation." 19 F.C.C.R. at 4978 ¶ 8. Given the underlying definitions of expletives, the

Commission's conclusion—that there is no "strict dichotomy" between the use of expletives as intensifiers and their literal use—is wholly rational. Indeed, on what basis, other than their actual meanings and attendant connotations, do any words possess the power to offend?

In further support of its changed indecency regulation policy, the FCC recognized the reality that "*in certain cases*, it is difficult (if not impossible) to distinguish whether a word is being used as an expletive or as a literal description of sexual or excretory functions." *Remand Order*, 21 F.C.C.R. at 13308 ¶ 23 (emphasis added). While such situations may be infrequent, their occurrence underscores the reasonable nature of the Commission's decision to adopt a policy that allows it to determine whether material is indecent by assessing each broadcast based on its individual context. In cases presenting this difficulty, a contextual approach is inherently more workable than any bright-line or *per se* rule dictating a pre-determined outcome, and will undoubtedly permit the Commission to more accurately distinguish material that is indecent from that which is not.

Yet another, "and perhaps [the] most important[]," reason for the policy change, as articulated by the Commission, is the agency's recognition of a need for consistency. *See id.* As the FCC observed, "categorically requiring repeated use of expletives in order to find material indecent is inconsistent with our general approach to indecency enforcement, which stresses the critical nature of context." *Id.* (citing FCC, *Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999,

8002-03 ¶ 9 (2001) ("Indecency Policy Statement") ("In determining whether material is patently offensive, the *full context* in which the material appeared is critically important") (emphasis in original)).

FCC publications since 1970 evidence the Commission's traditional focus on the importance of context. *See, e.g.*, *In Re WUHY-FM, Eastern Educ. Radio*, 24 F.C.C.2d 408, 410, 412 ¶¶ 6, 8 (1970) ("[T]he issue here does not involve presentation of a work of art or on-the-spot coverage of a bona fide news event . . . [but includes] an expression which conveys not [sic] thought, has no redeeming social value, and in the context of broadcasting, drastically curtails the usefulness of the medium for millions of people"); *Pacifica Opinion & Order*, 2 F.C.C.R. at 2699 ¶ 13 ("[S]peech involving the description or depiction of sexual or excretory functions must be examined in context to determine whether it is patently offensive under contemporary community standards applicable to the broadcast medium"); *In Re Infinity Broad. Corp. of Pennsylvania (WYSP(FM))*, 3 F.C.C.R. 930, 932 ¶ 14 (1987) ("There is no way to construct a definitive list [of patently offensive words and depictions] that would be both comprehensive and not over-inclusive in the abstract, without reference to the specific context").

In its most recent Indecency Policy Statement, intended to "provide guidance to the broadcast industry regarding . . . enforcement policies with respect to broadcast indecency," 16 F.C.C.R. at 7999 ¶ 1, the FCC listed several "principal factors" the Commission considers significant in determining whether broadcast material is indecent. The FCC again emphasized that "[e]ach indecency case presents its own particular mix of these, and possibly other,

factors, which must be balanced to ultimately determine whether the material is patently offensive and therefore indecent. No single factor generally provides the basis for an indecency finding." *Id.* at 8003 ¶ 10. Significantly, this Court previously has approved the FCC's decision to make determinations based on specific factual contexts, recognizing that such an "approach is appropriate for . . . the Commission when regulation of indecency is at stake, for *indecency is largely a function of context* . . ." *Pacifica*, 438 U.S. at 742 (emphasis added).

Despite this traditional focus on overall context, the Commission's statement in the *Pacifica Opinion & Order* distinguishing the bare use of an expletive from a depiction of sexual or excretory activity, as well as a number of subsequent Bureau-level decisions, *see Golden Globe Order*, 19 F.C.C.R. at 4981 ¶ 12 n. 32, resulted in an understanding that one factor—"whether material had been repeated—would always be decisive in a certain category of cases." *Remand Order*, 21 F.C.C.R. at 13308 ¶ 23. The FCC's recognition that such an approach represented a detour from its longstanding context-based method of indecency regulation, *see id.*, and the agency's express desire to return to a uniform indecency enforcement regime, in which it "examine[s] *all* factors relevant to that determination," *id.* (emphasis added), are rational and were sufficiently articulated to preclude a court from overturning the change.

This Court need not agree with the judgment calls made pursuant to an agency policy to uphold that policy as a valid exercise of the agency's discretion. Indeed, as previously noted, this Court's precedents make clear that such a substitution of a court's

judgment for agency expertise constitutes judicial error. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

Despite the Second Circuit's contrary conclusion, the FCC has provided "a reasoned explanation" for its "180-degree turn regarding its treatment of 'fleeting expletives.'" *Fox Television Stations, Inc.*, 489 F.3d at 455. Even if the Second Circuit's confusion suggests that this was an agency "decision of less than ideal clarity," *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, this Court has explained that it "will . . . 'uphold [such] a decision . . . if the agency's path may reasonably be discerned.'" *Id.* (quoting *Bowman Transportation, Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). At a minimum, the FCC's articulation of its policy change satisfies this standard of clarity such that it should be upheld under the "arbitrary and capricious" standard set forth in § 706 of the APA.

III. THE FCC'S CONTEXT-BASED APPROACH ALLOWS IT TO PROTECT THE RIGHTS OF ADULTS AND SIMULTANEOUSLY FURTHER ITS COMPELLING INTEREST IN PROTECTING CHILDREN.

The FCC's context-based approach to indecency regulation is preferable to application of a bright-line rule regarding "fleeting expletives" because it allows the Commission to respect the First Amendment rights of adults without compromising its compelling interest in protecting children from harmful material. As explained in Section I, *supra*, this Court's decisions repeatedly have recognized the FCC's interest in regulating the broadcast of indecent material during times when children are most likely to be in the

audience. *See, e.g., Denver Area Educ. Telecomms. Consortium, Inc.*, 518 U.S. at 743; *Pacifica*, 438 U.S. at 734, 749-50. At the same time, however, this Court has generally cautioned that when rights protected by the First Amendment are at stake, "the government may not 'reduce the adult population . . . to . . . only what is fit for children." *Butler*, 352 U.S. at 383.

The FCC's new broadcast indecency policy will have no such result. For example, in 2005, the Commission determined that broadcasting the unedited version of the World War II movie *Saving Private Ryan* outside the safe harbor period was not actionable because "the material, *in context*, is not patently offensive, and therefore, not indecent." *In Re Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 F.C.C.R. 4507, 4510 ¶ 8 (emphasis added). Although the film as broadcast included the use of numerous expletives and other generally offensive language, the Commission's context-based approach to indecency regulation allowed it to consider all of the relevant factors and conclude that

> in context, the dialogue, including the complained-of material, is neither gratuitous nor in any way intended or used to pander, titillate or shock. Indeed, it is integral to the film's objective of conveying the horrors of war through the eyes of these soldiers, ordinary Americans placed in extraordinary situations. Deleting all of such language or inserting milder language or bleeping sounds into the film would have altered the nature of the artistic work and

> diminished the power, realism and immediacy of the film experience for viewers.

Id. at 4512-13 ¶ 14. The Commission's new policy will not affect the ability of adults to continue to access such material during the safe harbor period and, as the *Saving Private Ryan* decision demonstrates, even prior to that time if the overall context indicates that the material is not patently offensive, as, for example, when it has been used for a legitimate artistic, historical, political or scientific purpose rather than simply to "pander, titillate or shock."

Any concern that the new policy may lead to self-censorship by broadcasters is easily answered by this Court's recognition in *Pacifica* that the Commission's definition of indecency will "deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern." 438 U.S. at 743. Furthermore, the *Pacifica* Court's assessment of the effect of the FCC's indecency definition applies with equal force to the Commission's new policy, since it continues to apply precisely the same definition:

> A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language.

Id. In recognition of the principle that "[i]nvalidating any rule on the basis of its hypothetical application to situations not before the Court is 'strong medicine' to be applied 'sparingly and only as a last resort,'" *id.*, the *Pacifica* Court "decline[d] to administer that medicine

to preserve the vigor of patently offensive sexual and excretory speech." *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). This Court should likewise decline to invalidate the FCC's indecency regulation policy on the basis of unfounded speculation about its hypothetical consequences.

While regulating all indecency—including "fleeting expletives"—on a contextual basis will interfere insignificantly, if at all, with the right of adults to continue to access adult-appropriate material, such a policy will allow the FCC to afford greater protection to children when they are likely to comprise a significant portion of the broadcast audience. Continued application of the FCC's previous bright-line approach, in which the repetition of the non-literal use of an expletive was a prerequisite to a finding of indecency, would require the FCC to ignore the harm to children any time such an expletive is used in isolation, regardless of the graphic or offensive nature of the utterance. The FCC should not be forced to provide "an automatic exemption for 'isolated or fleeting' expletives," 21 F.C.C.R. at 13309 ¶ 25. Rather, given its expertise in the area of indecency regulation, and in accordance with this Court's concern that broadcasting indecency has the ability to "enlarge[] a child's vocabulary in an instant," *Pacifica*, 438 U.S. at 749, the FCC should be free to exercise its discretion so as to protect children when the harm of exposure to such material outweighs other relevant contextual factors.

CONCLUSION

This Court should reverse the Second Circuit's decision.

Respectfully submitted,

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